Supreme Court, U.S.
FILED

97-40 APR 2 1997

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1996

RONALD B. BUSKIRK and WILLIAM J. ESTILL, on behalf of themselves and others similarly situated,

Petitioners,

vs.

THE STATE OF GEORGIA AND THE HONORABLE ZELL MILLER, GOVERNOR, individually, and in his official capacity, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the Georgia Supreme Court

PETITION FOR A WRIT OF CERTIORARI

ALAN S. GAYNOR
Counsel of Record
BOUHAN, WILLIAMS & LEVY
Attorneys for Petitioners
P.O. Box 2139
Savannah, Georgia 31498
(912) 236-2491

71454 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

45 pp

QUESTIONS TO BE PRESENTED FOR REVIEW

I. WHETHER THE GEORGIA SUPREME COURT ERRED IN HOLDING THAT THE PETITIONERS DID NOT HAVE A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST IN ANNUAL WITHIN-IN GRADE INCREASES PURSUANT TO THE STATE OF GEORGIA'S TWENTY-FIVE YEAR PRACTICE AND CUSTOM OF GIVING SAID INCREASES TO ITS EMPLOYEES WHO EARNED THEM?

II. CAN THE GEORGIA SUPREME COURT, VIA AN INTERPRETATION OF THE GEORGIA CONSTITUTION, DETERMINE THAT A FEDERALLY PROTECTED PROPERTY INTEREST DOES NOT EXIST?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CONTENTS - APPENDIX A iii

TABLE OF AUTHORITIES iv

OPINIONS 2

JURISDICTION 2

BASIS FOR FEDERAL JURISDICTION 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 12

CONCLUSION 25

TABLE OF CONTENTS

APPENDIX

Appendix A — Opinion of the Supreme Court of Georgia Decided March 3, 1997 ..... 1a

Appendix B — Order of the Superior Court of Fulton County, State of Georgia Dated May 6, 1996 ..... 5a

Appendix C — Order Denying Motion for Reconsideration of the Supreme Court of Georgia Dated April 3, 1997 ..... 11a

TABLE OF AUTHORITIES

U.S. Supreme Court Cases

Bell v. Burson, 402 U.S. 535, 542, 29 L.Ed.2d 90, 96-97 (1971) . . . . . - 17 -

Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) . . . . . - 13 -

Boyd v. Nebraska, 143 U.S. 135, 36 L.Ed. 103, 12 Sup.Ct. 375 (1982) . . . . . - 19 -

Carey v. Piphus, 435 U.S. 247 (98 S.C. 1042, 55 L.Ed.2d 252) (1978) . . . . . - 18 -

Farrar v. Hobby, 506 U.S. (113 S.C. 566, 121 L.E.2d 494) (1992) . . . . . - 18 -

J.I. Case Co. v. Borak, 377 U.S. 80, 12, L.Ed. 2d 423, 84 Sup.Ct. 1555 (1964) . . . . . - 20 -

Perry v. Sindermann, 408 U.S. 593, 601-603, 92 S.Ct. 2694, 2699-2700, 33 L.Ed.2d 570 (1972) . . . . . - 17 -

Perry v. Sindermann, 408 U.S. at 601, 92 S.Ct. at 2699 - 15 -

Silas Mason Co. v. Tax Commission, 302 U.S. 186, 82 L.Ed. 187, 58 Sup.Ct. 233 (1937) . . . . . - 19 -

Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173, 87 L.Ed. 165, 63 Sup.Ct. 173 (1942) . . . . . - 19 -

Sutton v. Leib, 342 U.S. 402, 96 L.Ed. 448, 72 Sup.Ct. 398 (1951) . . . . . - 19 -

Federal Court Cases

Adams v. Bainbridge-Decatur County Hosp. Auth., 888 F.2d 1356, 1363 (11th Cir. 1989) . . . . . - 13 -

Brown v. Georgia Dep't. of Revenue, 881 F.2d 1018, 1027-1028 (11th Cir. 1989) . . . . . - 14 -

Daly v. Sprague, 675 F.2d 716 (5th Cir. 1982) . . . . - 14 -

Griffith v. Federal Labor Relations Authority, 842 F.2d 487 (D.C. Cir. 1988) . . . . . - 14 -, - 15 -, - 16 -

McKinney v. Pate, 20 F.3rd 1550 (11th Cir. 1994) . - 13 -

Needleman v. Bohlen, 457 F.Supp. 942 (D. Mass. 1978), aff'd., 602 F.2d 1 (1st Cir. 1979) . . . . . - 14 -

Nicholson v. Gant, 816 F.2d 591, 597 (11th Cir. 1987) - 13 -, - 17 -

Nolin v. Douglas County, 903 F.2d 1546 (11th Cir. 1990), overruled on other grounds in McKinney v. Pate, 20 F.3rd 1550 (11th Cir. 1994) . . . . . - 13 -, - 14 -

Peterson v. Atlanta Housing Authority, 998 F.2d 904, 915 (11th Cir. 1993) . . . . . - 18 -

Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 447-48 (2nd Cir. 1980) . . . . . - 17 -

Wheeler v. Mental Health and Mental Retardation Center of Harris County Texas, 752 F.2d 1063 (5th Cir. 1985), cert. denied, 474 U.S. 824, S.Ct. 78, 88 L.E.2d 64. . . . . - 18 -

Wofford v. Glynn Brunswick Memorial Hosp., 864 F.2d 117 (11th Cir. 1989) . . . . . - 13 -, - 14 -

Federal Statutes

5 U.S.C. §5335(a)(3)(B) . . . . . - 16 -

United States Const., Amend. XIV, Section 1 . . . . . - 17 -

Georgia Case Law

Alonso v. Hosp. Auth. of Henry County, 175 Ga. App. 198, 202, 332 S.E.2d 884, 888 (1985) . . . . . - 14 -

Butts County v. Jackson Banking Co., 129 Ga. 801, 809-810 (1907) . . . . . - 21 -

Central of Georgia Railway Co. v. Wright, 165 Ga. 1, 12 (1927) . . . . . - 22 -

Citizens and Contractors Bank v. Maddox, 175 Ga. 779, 784-85, 166 S.E. 227, 230 (1932) . . . . . - 17 -

City Council of Dawson v. Dawson Waterworks Company, 106 Ga. 696 (1899) . . . . . - 21 -

Clark v. State Personnel Board, et al., 252 Ga. at 550, 314 S.E.2d at 660 . . . . . - 14 -

Dep't. of Corrections v. Mack, 217 Ga. App. 866, 459 S.E.2d 573 (1995) . . . . . - 18 -

Department of Transp. v. Consolidated Equities Corp., 181 Ga. App. 672, 675, 353 S.E.2d 603, 606 (1987) . . . - 14 -

Dowling v. Atlanta City Sch. Dist., 216 Ga. App. 688, 455 S.E.2d 399 (1995) . . . . . - 18 -

Hancock v. Board of Tax Assessors, 226 Ga. 570, 176 S.E.2d 102 (1970) . . . . . - 17 -

Macon Ambulance Service, Inc. v. Snow Properties, Inc., 218 Ga. 262 (1962) . . . . . - 23 -

Morton v. State Personnel Board, 198 Ga. App. 845, 403 S.E.2d 455 (1991) . . . . . - 18 -

Sims v. City of Toccoa, 256 Ga. 368, 349 S.E.2d 385 (1986) . . . . . - 17 -

Wilkes County v. Mayor and Council of Washington, 167 Ga. 181, 197 (1928) . . . . . - 22 -

Georgia Statutes and Attorney General Opinions

1980 Op. Atty. Gen'l. 80-163 . . . . . - 24 -

Ga. Const., Art. I, Sec. 1, Par. 1 . . . . . - 17 -

Ga. Const. Art. VII, Sec. IV, Para. VIII.- 20 -

Ga. Const. Art. III, Sec. IX, Para. II(a) (1983) . . . . - 23 -

Ga. Const. Art. III, Sec. IX, Para. III (1983) . . . . . - 24 -

Ga. Const. Art. VII, Sec. IV, Para. IX (1983) . . . . - 23 -

O.C.G.A. §28-5-25 . . . . . - 25 -

O.C.G.A. §45-20-1(a). . . . . - 12 -

IN THE SUPREME
COURT OF THE UNITED STATES
OCTOBER TERM, 1996

CASE NO.:

RONALD B. BUSKIRK and
WILLIAM J. ESTILL, ON behalf
of themselves and others similarly situated,

Petitioners,

VS.

THE STATE OF GEORGIA AND THE
HONORABLE ZELL MILLER,
GOVERNOR, individually, and in
his official capacity; et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE GEORGIA SUPREME COURT

To the Honorable William J. Rheinquest, Chief Justice, and Associate Justices of the Supreme Court of the United States:

Petitioners, RONALD E. BUSKIRK and WILLIAM J. ESTILL, ON behalf of themselves and others similarly situated, respectfully pray that a Writ of certiorari issue to review the Judgment Order of the Georgia Supreme Court entered April 3, 1997, affirming the granting of the State of Georgia's Motion for Summary Judgment, and in support thereof represents as follows:

OPINIONS

The Judgment of the Georgia Supreme Court affirming the decision of the Fulton County, Georgia Superior Court is not officially reported and is reproduced in the Appendix hereto at Page 1a. The Petitioners seek certiorari for review of the Georgia Supreme Court's denial of reconsideration of that Order. Reconsider denied on April 3, 1997.

JURISDICTION

The original Judgment of the Georgia Supreme Court was entered on March 3, 1997. The Georgia Supreme Court denied reconsideration on April 3, 1997.

BASIS FOR FEDERAL JURISDICTION

28 U.S.C. §1257

STATEMENT OF THE CASE

The material facts giving rise to this controversy are not in dispute. The conduct in question had its origin on April 12, 1991, when newly elected Governor Zell Miller announced, by press release, that he was unilaterally freezing State workers' salaries in an effort to control State spending for the remainder of Fiscal Year (FY) 1991. (R.2037-2039). This pay freeze was originally announced as a temporary measure to address a projected budget shortfall in FY 1991 (R.1993; 2038). However, as will be explained below, Appellees, via a series of maneuvers, continued to freeze State workers' pay through the end of FY 1995. The stated basis for the continuation of the freeze was an alleged ongoing period of "budgetary restraint." No authority existed for these actions and no real period of "budgetary restraint" existed. Rather, State workers' salaries were illegally targeted for a freeze based on impermissible political influences.

Prior to April 1991, under the Merit System Act and Rules and Regulations of the State Merit System Personnel Board (hereinafter "the Rules") and the practice in Georgia's various state agencies, all State employees subject to the Act (hereinafter sometimes "classified employees") earned, on their employment anniversary date, salary advances for satisfactory or better job performance. This interpretation and practice under the Merit System Act and Rules was longstanding, dating back at least twenty-five (25) years prior to April 1991. (R.2155-2157; 833-834). These salary advances (also sometimes hereinafter referred to as "within grade pay increases") were accomplished pursuant to the authority of

Chapter 478-1-.0A, PARs. A.301 and A.302 of the Merit System Rules. These are the primary Rules at issue in this appeal. They were in effect during the time period in question and are still in effect today.[1] They state, in pertinent part, that:

> All salary advancements shall be based upon quality and quantity of work as reflected by service ratings and upon other measures of performance, giving due consideration to length of service, and shall correspond with the steps of the approved salary range. (Emphasis added).
>
> Each employee shall be considered for a salary advance at least annually. The appointing authority may advance an employee's salary by any number of steps up to and including step seven of the range; provided, however, that prior to such an advancement the appointing authority must execute a performance

---

[1] State fiscal years begin on July 1st and end on June 30th. Thus, the time period in question (FY 1992-1995) is July 1, 1991 through June 30, 1995. With the exception of certain additional language attempting to suspend their use during periods of so-called "budgetary restraint," the requirements of the above PARs. A.301 and A.302 were, in July of 1992, reenacted in portions of new PARs. 17.401 and 17.402.1 and were in effect continuously during the entire time period in question (FY 1992-1995).

> appraisal or otherwise document the reason for the advancement. (Emphasis added).

The above within-grade salary advances were calculated via use of one or more annual pay schedules approved by the State Merit System. (R.2119-2122). The pay schedules had a number of job classifications and each employee's job fit into a classification. Each job classification has seven initial, annual steps, and four, two-year, "longevity" steps. Prior to the "freeze" in April of 1991, every eligible State classified employee who earned a satisfactory score on his or her annual performance appraisal or other documented criteria was advanced a step on a pay schedule. (R.2155-2156). Each higher step had a corresponding dollar figure which was larger than the preceding step. Under this system, there is no doubt that State employees, who were on the first seven annual steps of their job classification, were legally entitled to be considered for salary advance "at least annually" based on objective criteria. (See PARs. A.301 and A.302 of the Rules). Likewise, there is no dispute that, after an employee had risen to the seventh step in his or her job classification, he or she was entitled to be considered for a salary advance at least every two (2) years, again, based on objective criteria. (See, PAR. A.701 of the rules).

During the freeze (i.e., FY 1992-95), Appellees continued to administer annual performance appraisals to Petitioners, but did not consider any classified employees for within-grade pay increases during this time. (R.2168-2169).The Plaintiffs in this class action are that portion of the State classified employees who earned one or more satisfactory performance appraisals or met other documented criteria under

the Board rules during all or part of FYs 1992-1995 but did not receive within-grade pay increases. (R.421).

Prior to the Governor's announcement of a freeze in April of 1991, and in accord with long-standing policy and practice, the OPB (Office of Planning and Budget) instructed the various State agencies to request enough money to fund within-grade pay increases for Fiscal Year ("FY") 1992. (R.2152-2160). Pursuant to the requirements of the Constitution, the Governor presented the agencies' recommendations, and his recommendations, to the Legislature for purposes of FY 1992. The Legislature then passed, and the Governor signed, an Appropriations Act for FY 1992 which contained a lump sum of money for each agency or department which was large enough to include funding of within-grade pay increases for that year. (R.2390-2391). It was shortly after passage of this Appropriations Act that annual within-grade pay increases were frozen by the Governor and his appointees.

On April 25, 1991, in a joint memo from Governor Miller's Budget Director and the Merit Commissioner, the pay freeze was extended through FY 1992. (R.2045-2047). The Governor had no authority for the initial April 12th freeze, and the State Merit System Rules had not been previously amended to authorize this further action by the OPB Director and the Commissioner. (R.1997-2000; 2175-2176). Instead, the Director of the OPB and the State Merit System Commissioner declared that there was no need to modify the State Personnel Board Rules and regulations to implement the Governor's initial freeze for the remainder of FY 1991 or its continuation through FY 1992. (R.2045-2046). They ordered certain "restrictions" on the within-grade pay increase provisions of the Board Rules and admitted that the "restrictions" included an

outright ban on within-grade pay increases for the duration of the freeze. (R.2046-2047). After FY 1992 began (i.e., July 1, 1991), an August 1991 extraordinary session of the Legislature was convened. During this session, money was deappropriated from the "personal services" line item of the budget for each State agency (i.e., payroll funds) equal to the amount already appropriated to fund within-grade pay increases for FY 1992. (R.2387-2388; 2390-2391). No "availability of funds" contingency was in the contract of the classified employees (the Merit Act statutes and regulations) which would allow for a reduction in pay after the fiscal year began. (R.2004; 2168-2170).

After the freeze was announced, the OPB, pursuant to meetings of the Governor, amended its longstanding practice of instructing agencies to include within-grade pay increases in their funding requests for the upcoming fiscal year. The result was that the agencies were instructed to no longer request a sum of money sufficient to cover within-grade pay increases. (R.1884-1891; 1841). The Merit Board was not consulted and the decision was not pursuant to any authority in the Merit System Rules. (R.1884-1885). Thus, the agencies' requests for FY 1993, and the Governor's recommendations, which were submitted to the Legislature for FY 1993 did not include enough funds sufficient for a within-grade pay increase! On July 19, 1992, the OPB Director and Merit Commission announced that the freeze on within-grade pay increases was being extended through the end of FY 1993 (i.e., June 30, 1993). (R.2058-2059). These actions continued the freeze, but there was admittedly still no change in the Merit Rules before the beginning of FY 1993 (i.e., July 1, 1992) purporting to authorize such action for that fiscal year! (R.2002-2008).

In August of 1992, the State Merit System for the first time enacted regulations purporting to authorize a pay freeze. They provided for a "delay" in the grant of within-grade pay increases during an undefined "period of budgetary restraint." (R.2064, 2075-2076). (The regulations were shortly thereafter amended to create a permanent denial of increases, instead of a "delay.") (R.770-771, Ex. "E"). The amendments, purporting to allow two appointees of the Governor (Budget Director and Merit Commissioner) to declare a freeze of within-grade pay increases for the entire State Merit System, were based upon no objective criteria whatsoever. (R.2075 at PAR. 17.404). Despite their existence, the new regulations were not used to declare a freeze during FYs 1994 and 1995! (R.2017-2020). Instead of a joint announcement of a period of "budgetary restraint" by the Merit Commissioner and the OPB Director, the State Merit System Board unilaterally announced, in May of 1994, that the freeze on salary increases was being extended for an additional twenty-four (24) months or "sooner if funds were made available." (R.1010; 2107; 2110) The agencies were already under instructions from the Governor not to request funds sufficient to cover within-grade pay increases for FYs 1994-1995, and the Legislature did not appropriate enough funds to cover within-grade pay increases for these years. (R.2390-2391).

The evidence shows that Georgia was not in any unique period of "budgetary restraint" or adverse economic conditions during FY 1992-1995. In fact, Appellees have yet to provide a legally adequate definition of the term "period of budgetary

restraint." [2] Appellees have also conceded that they could have afforded the pay increases, earned by Petitioners, by instituting a reduction in force or reduction in salary pursuant to the existing rules, or by not cutting various taxes which were decreased during this time frame, or by increases taxes, or by rearranging "priorities" and not changing taxes. (R.1918; 1960; 1973-1976; 1849-1851). Appellees have also acknowledged that, for the twenty-five (25) year period prior to the pay freeze, all classified employees who earned satisfactory or better performance appraisals received increases, even when the State suffered through worse recessions with actual negative revenue growth! (R.1865-1866; 2155-2157).

When asked to define a period of "budgetary restraint" in this lawsuit, Appellees could not provide a definition. Deponents gave lengthy and complicated explanations and attempted to enumerate various criteria, but eventually, basically stated that they simply "knew it when they saw it." (R.1851-1853; 1982-1984; 2183).

Even if there had been significant financial problems during FYs 1992-1995, the State Merit System Rules already had in place provisions for a reduction in force or a reduction

---

[2] State revenues grew by 1.4% in FY 1992, 11.5% in FY 1993, 8.6% in FY 1994, and 7.9% in FY 1995! Annual State revenues went up by $2.5 billion during the period of so-called "budgetary restraint" between FY 1992-1995. However, annual revenues during the prior four (4) year period, from FY 1987-1991, when there was no period of "budgetary restraint," went up only $1.837 billion! (R.1853-1854; 775).

in salary when there was a shortage of work, shortage of funds, or period of economy. (R.1062; 1066-1067; 1088-1090; 1095; 1103; 1126-1127). Regulation D of the Rules provided a method of determining those who would be affected by such a reduction. (R.1069-1076; 1104-1110; 1119-1122). State employment had ballooned 23% over a period of only four years prior to the freeze with the result that Georgia was substantially above the national average in State positions per number of State residents. (R.777) In this regard, Appellees have admitted that a reduction in force of 5% or less would have allowed the State to afford within-grade pay increases, even without rearranging "priorities," (R.1938; 1981), However, the Governor did not allow the agencies to follow their own rules and institute a reduction in force or salary. Instead, he unilaterally and without authority implemented a four year freeze on all wages.

In November 1993, the State Personnel Board took the extraordinary step of advising Governor Miller in writing that, due to the pay freeze, average State salaries in Georgia had only increased by 1.4% during FY 1992-1994, and that, as a result, the salaries of Georgia's classified employees ranged from 3 to 54% below market rate and that the classified employees would need at least a 12% raise to catch up with market pay! (R.782). These circumstances were causing a growing concern among various State agencies that the State was becoming a training ground for private industry and that State employees were being offered minimal incentive to remain at their jobs. (R.783). However, the Governor did not allow the agencies to follow their own rules. The clear inference is that, politically, the Governor wanted the jobs. The result of all this is that deserving State workers were, and still

are, being monetarily damaged and penalized by illegal conduct based on political expediency.

The stated purpose of the Georgia Merit System is...

> . . . to establish in the state a system of personnel administration based on merit principles and scientific methods governing the classification of positions and the employment, conduct, movement, and separation of public officers and employees. It is also the purpose of this article to build a career service in government which will attract, select, and retain the best employees on merit, free from coercive political influences, with incentives in the form of equal opportunities for promotions in the service, which will eliminate unnecessary and inefficient employees and which will provide technically competent and loyal personnel to render impartial service to the public at all times and to render such service according to the dictates of ethics and morality. (Emphasis added).

O.C.G.A. §45-20-1(a).

Contrary to the purposes of the Georgia Merit System Act, Governor Miller and Appellees "coercive political influence" ignored long-standing practice and overrode the Act and Rules. This caused the best employees to flee employment

by the State of Georgia and penalized the ones who stayed and fulfilled their end of the bargain!

REASONS FOR GRANTING THE WRIT

I. THE GEORGIA SUPREME COURT ERRED IN HOLDING THAT THE PETITIONERS DID NOT HAVE A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST IN ANNUAL WITHIN-IN GRADE INCREASES PURSUANT TO THE STATE OF GEORGIA'S TWENTY-FIVE YEAR PRACTICE AND CUSTOM OF GIVING SAID INCREASES TO ITS EMPLOYEES WHO EARNED THEM.

The Georgia Supreme Court clearly erred in determining that the Petitioner did not have a protected property interest in within-grade pay increases during Fiscal Years 1992-1995.

In *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), this Court set forth the means by which a property entitlement in a public employment benefit is established against a state government. Specifically, the Court stated that ". . . To have a property interest in a [government] benefit, a person clearly must have more than an abstract desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents v. Roth*, 408 U.S. at 577, 33 L.Ed.2d at 561. *See also Adams v. Bainbridge-Decatur County Hosp. Auth.*, 888 F.2d 1356, 1363 (11th Cir. 1989); *Nolin v. Douglas County*, 903 F.2d 1546 (11th Cir. 1990), overruled on other grounds in *McKinney v. Pate*, 20 F.3rd 1550 (11th Cir. 1994); Wofford v. Glynn Brunswick Memorial Hosp., 864 F.2d 117 (11th Cir. 1989).

The existence of a property interest is to be determined in accordance with state law. *Nicholson v. Gant*, 816 F.2d 591, 597 (11th Cir. 1987); *Nolin*, 903 F.2d at 1553; *Wofford*, 864 F.2d at 119. Under both Georgia and federal law, a public employee's "legitimate claim of entitlement" can be supported by contract or state law. *Alonso v. Hosp. Auth. of Henry County*, 175 Ga. App. 198, 202, 332 S.E.2d 884, 888 (1985). *See also Daly v. Sprague*, 675 F.2d 716 (5th Cir. 1982). The Court is to make its determination ". . . by reference to laws, regulations, or personnel policies." *Nolin*, 903 F.2d at 1553.

It has already been established that the Merit Act and Rules thereunder create a "constitutionally protected" contract between Plaintiffs and the State. *Clark v. State Personnel Board, et al.*, 252 Ga. at 550, 314 S.E.2d at 660. Under Georgia law, contracts establish property rights. *Department of Transp. v. Consolidated Equities Corp.*, 181 Ga. App. 672, 675, 353 S.E.2d 603, 606 (1987); *Brown v. Georgia Dep't. of Revenue*, 881 F.2d 1018, 1027-1028 (11th Cir. 1989) (Georgia Merit System creates property right).

In *Needleman v. Bohlen*, 457 F.Supp. 942 (D. Mass. 1978), aff'd., 602 F.2d 1 (1st Cir. 1979), the district court found a property interest in an annual salary increment, based upon the terms of an agreement between the teacher's association and the school system under which it was agreed that the increment would not be withheld unless teaching performance was evaluated as "unsatisfactory." *Needleman*, at pp. 945-946. These facts are virtually identical to the facts now before this Court!

Griffith v. Federal Labor Relations Authority, 842 F.2d 487 (D.C. Cir. 1988), cited in previous briefs by Respondents,

involved an employee with an admittedly unsatisfactory performance appraisal. 842 F.2d at 489. Further, in *Griffith*, the plaintiff expressly made no claim that the ". . . agency conduct has, independently of the statute and regulations, created `mutually explicit understandings' that would form an entitlement. *See, Perry v. Sindermann*, 408 U.S. at 601, 92 S.Ct. at 2699, so we have no occasion to assess that conduct." 842 F.2d 485, fn. 3. While the facts are different, the legal analysis in *Griffith* clearly supports Petitioners' position. *Griffith* noted that plaintiff's initial hurdle was to ". . . establish that her interest in a within-grade pay increase was one protected by . . ." the due process clause of the Fifth Amendment. *Griffith* at 495. The Court then noted that, in order to do so, she must show that ". . . the substantive provisions governing the grant of such increases give her a `legitimate claim of entitlement.' [Cits. omitted]. If they did so, it would be by specifying `particularized standards or criteria [to] guide the . . . decision makers.' [Cits. omitted]." *Griffith* at 495. The Court first noted that the above inquiry has two aspects:

> First a search for congressional intent on the degree of discretion left to the administrator, then a consideration whether, given the scope of the discretion, the employee's interest should be classified as an entitlement.

Griffith at 496.

The Court held that the plaintiff in *Griffith* could not make a showing of an entitlement because the Federal Salary

Reform Act under scrutiny had already replaced a ". . . system under which within-grade pay increases were tied to performance ratings of `satisfactory' or better, and provides that federal employees are advanced to the next highest rating of pay within a particular grade only if `the work of the employee . . . is of an acceptable level of competence as determined by the head of agency.' 5 U.S.C. §5335(a)(3)(B) (emphasis added)." *Griffith* at 496. Thus, the court was indicating that a performance rating system, like the Federal government had before the Reform Act, and like Georgia had during the time period in question, would create a legitimate claim of entitlement, but the new vague and discretionary system under the Reform Act would not.

The terms of the Merit Rules and Regulations themselves make a compelling case for entitlement based upon the rationale in *Griffith* and the holding in *Needleman*. Specifically, statutes and regulations herein, which have remained virtually unchanged for well over twenty-five (25) years, do afford the necessary "particularized standards or criteria" to guide the decision makers. Under the rules, employees shall be considered for a pay increase annually based on objective criteria set forth in the rules, including "service ratings and upon other measures of performance, giving due consideration to length of service, and shall correspond with the steps of the approved salary range." (R.1094). Further, under Board Rule 13.300, the appointing authorities ". . . shall administer a system for the periodic review and rating of the quality and quantity of work performed by employees" and the ". . . performance rating shall be made on the form(s) approved by the Commissioner and shall be considered in making changes in status in pay and in determining the order of reduction in force." (R.1063). The performance appraisal

instrument itself indicates that the annual appraisal is to be completed in accordance with a detailed "Merit System Performance Appraisal Manual." (R.2653-2655). Appellees have conceded that under the Rules, consideration for pay raises must be based on objective criteria. (R.2444).

Even assuming arguendo, that Plaintiffs were not entitled to these benefits pursuant to a contractual and/or legal right under the rules, a property entitlement is nevertheless established herein due to the longstanding policy and practice, upon which Plaintiffs relied, of providing within-grade pay increases upon satisfactory performance. *See, Perry v. Sindermann,* 408 U.S. 593, 601-603, 92 S.Ct. 2694, 2699-2700, 33 L.Ed.2d 570 (1972). *See also, Quinn v. Syracuse Model Neighborhood Corp.,* 613 F.2d 438, 447-48 (2nd Cir. 1980). Having established that a longstanding property right exists in within-grade pay increases, it must be determined whether due process was accorded when this property right was taken away from them by the pay freezes. *Nicholson v. Gant,* 816 F.2d at 598.

The United States Constitution prohibits any state from depriving "any person of life, liberty, or property, without due process of law." United States Const., Amend. XIV, Section 1. The Georgia Constitution contains a similar prohibition. *See* Ga. Const., Art. I, Sec. 1, Par. 1. Although due process does not guarantee a particular form or method of state procedure, the fundamental basis of due process is notice and an opportunity to be heard. *Hancock v. Board of Tax Assessors,* 226 Ga. 570, 176 S.E.2d 102 (1970); *Citizens and Contractors Bank v. Maddox,* 175 Ga. 779, 784-85, 166 S.E. 227, 230 (1932); *Sims v. City of Toccoa,* 256 Ga. 368, 349 S.E.2d 385 (1986); *Bell v. Burson,* 402 U.S. 535, 542, 29

L.Ed.2d 90, 96-97 (1971). Within this fundamental framework of constitutional protection, both Georgia and federal courts have struck down state government actions which adversely affected public employees' property rights without due process. *Dep't. of Corrections v. Mack*, 217 Ga. App. 866, 459 S.E.2d 573 (1995); *Morton v. State Personnel Board*, 198 Ga. App. 845, 403 S.E.2d 455 (1991); *Peterson v. Atlanta Housing Authority*, 998 F.2d 904, 915 (11th Cir. 1993); *Wheeler v. Mental Health and Mental Retardation Center of Harris County Texas*, 752 F.2d 1063 (5th Cir. 1985), cert. denied, 474 U.S. 824, S.Ct. 78, 88 L.E.2d 64.

Where a governmental entity has established a procedure and then ignored it, such as the terms and rule-making procedure of the State Merit System, the courts will strike down the State government actions which adversely affected public employees' property rights without due process and will award damages, attorneys' fees, and even punitive damages if the Defendants' conduct involved reckless or callous indifference to Plaintiffs' rights. *Dowling v. Atlanta City Sch. Dist.*, 216 Ga. App. 688, 455 S.E.2d 399 (1995); *Carey v. Piphus*, 435 U.S. 247 (98 S.C. 1042, 55 L.Ed.2d 252) (1978); *Farrar v. Hobby*, 506 U.S. ___ (113 S.C. 566, 121 L.E.2d 494) (1992); *Dep't. of Corrections v. Mack*, 217 Ga. App. 866, 459 S.E.2d 573 (1995).

The freeze was instituted and enforced in FYs 1992 and 1993 before the Rules were amended. The Rules were amended before FY 1994 but were not used to declare a freeze for FY 1994 or FY 1995. Additionally, the 1992 amendments were unconstitutional. Thus, the legally binding mandate that workers shall be considered annually for pay increases based on objective criteria coupled with the 25-year history of awarding

same for satisfactory performance, gave rise to a property right which was summarily denied by the Governor and his appointees without due process.

II. THE GEORGIA SUPREME COURT CANNOTR VIA AN INTERPRETATION OF THE GEORGIA CONSTITUTION, DETERMINE THAT A FEDERALLY PROTECTED PROPERTY INTEREST DOES NOT EXIST?

Essentially, the Georgia Supreme Court ignored federal law pertaining to the legitimate expectation of a property interest and simply determined that State law governs the issue. The Court relied upon an obscure provision of the State of Georgia Constitution, stating that the expectation of within-grade pay increases were an illegal pledge of credit by the Georgia Legislature. Hence, the issue now before this Court is whether the Georgia Supreme Court's unilateral determination that a property interest could not have existed under State law is determinative of the Petitioners' federal claims.

Generally, a federal court is not precluded by a State Court's determination of a right claimed under a federal statute. *Boyd v. Nebraska*, 143 U.S. 135, 36 L.Ed. 103, 12 Sup.Ct. 375 (1982). Of course, the Supreme Court will generally give "great weight" to the views of the state court as to the operation of State law when it touched upon federally-protected interests. *Silas Mason Co. v. Tax Commission*, 302 U.S. 186, 82 L.Ed. 187, 58 Sup.Ct. 233 (1937). Further, when a federal statute is involved, conflicting State law and policy must yield when they frustrate the purposes of the federal legislation. *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 87 L.Ed.

165, 63 Sup.Ct. 173 (1942). The responsibility for the decision of federal constitutional issues rests finally on the U.S. Supreme Court. *Sutton v. Leib*, 342 U.S. 402, 96 L.Ed. 448, 72 Sup.Ct. 398 (1951). The fact that questions of State law must be decided in a case in which a federal right is asserted does not change the character or substance of the federal right., *J.I. Case Co. v. Borak*, 377 U.S. 426, 12, L.Ed. 2d 423, 84 Sup.Ct. 1555 (1964).

This Court is not bound by the Georgia Supreme Court's decision a federally-protected property interest did not exist in the instant case. The Georgia Supreme Court took mandatory state rules and a 25-year history of paying within-grade pay increases, upon receipt of satisfactory performance reviews, and suddenly decided that there was no federally protected property interest in these increases because that right would be unconstitutional under Georgia's constitution!

In regard to claims arising on or after September 1, 1992 (most of FY 1993, as well as FYs 1994 and 1995), the Georgia Supreme Court erroneously reasoned that within-grade pay increases constitute an unconstitutional pledge of credit because they automatically entitle Petitioners to unlimited future salary increases, regardless of either availability of funds or legislative appropriation. (R.2706-2708). This reasoning is fundamentally flawed and must be reversed. Under this reasonsing, virtually all current year operating expenses would be an unconstitutional pledge of credit and the State Government could never plan for, or legally fund, operating expenses for upcoming years!

The specific constitutional provision at issue is Ga. Const. 1983, Art. VII, Sec. IV, Para. VIII. It establishes that:

> Except as provided in this Constitution, the credit of the state shall not be pledged or loaned to any individual, company, corporation, or association. The state shall not become a joint owner or stockholder in or with any individual, company, association, or corporation.

In *City Council of Dawson v. Dawson Waterworks Company*, 106 Ga. 696 (1899), the Supreme Court of Georgia defined what is meant by "debt." The Supreme Court noted that salaries and expenses of government are paid each year out of the taxes raised during the year in which services are rendered. *Id.* at 711. Therefore, debt "is to be understood as a liability which is undertaken and which must be discharged at some time in the future, but which is not to be discharged by a tax levied within the year in which the liability is undertaken." *Id.* at 711-713. The Supreme Court stated, at p. 713, that:

> A liability for a current expense can be incurred by a municipal corporation for any one year, provided there is, at the time of incurring the liability, a sufficient sum in the treasury of the city which may lawfully be appropriated to the payment of the liability incurred, or if a sufficient sum to discharge the liability can be raised by taxation during the current year; and such a transaction would not create a debt within the meaning of that word as it is used in the constitution. (Emphasis added).

Thus, the government can contract liabilities for current expenses in anticipation of its annual revenue. *Butts County v. Jackson Banking Co.*, 129 Ga. 801, 809-810 (1907). The government is not allowed to make a "debt" unconstitutional by taking funds, which could have been used to pay current operating expenses in a given fiscal year, and using them for another purpose or by reducing taxes so that there are not enough funds available. *Central of Georgia Railway Co. v. Wright*, 165 Ga. 1, 12 (1927); *Wilkes County v. Mayor and Council of Washington*, 167 Ga. 181, 197 (1928). The Respondents have admitted that the State of Georgia could have afforded the within-grade pay increases each fiscal year, via taxes collected or raising taxes or cutting other expenditures or by a reduction in force or reduction in salary; however, it was a matter of "priority" to pay for other things and to keep all State employees employed and at their same salary level. Thus, there was no "debt" or "pledge of credit" in regard to within-grade pay increases.

The second reason why the State Merit System contracts are not a pledge of credit is that the constitutional meaning of debt is an obligation today. *Epping v. City of Columbus*, 117 Ga. 263 (1903). As applied to this case, in FY 1991 Respondents owed nothing for work to be performed by the Plaintiffs in FY 1992. It was only when work was performed in FY 1992 that Respondents owed money for same. Thus, there was no future obligation in FY 1991 because Defendants had no obligation in FY 1991 for work performed in FY 1992. All obligations in FY 1991 were for current operating expenses that year. Merit Commissioner Bennett made this clear in her deposition when she explained that within-grade increases are not perpetual promises into the unfunded future; instead, they

are precise calculations of the upcoming year's expenses in anticipation of current revenues. (R.2159-2163).

Respondents argue that promises cannot extend more than one fiscal year into the future. However, the State Merit System pay increases were annual promises since the pay increase, if any, for each employee was determined before each fiscal year by creating one or more new pay schedules in order to fund the projected costs. In fact, various annual pay schedules were created for FYs 1992-1995. (R.735-749). Regardless of the fact that Plaintiffs' contracts did not extend more than one fiscal year into the future, in *Macon Ambulance Service, Inc. v. Snow Properties, Inc.*, 218 Ga. 262 (1962), the Supreme Court of Georgia, without explicitly overruling the prior opinions, held that a five-year contract with a company to provide ambulance service to a government-run hospital for a certain amount of money per year was not a debt! This decision allows governments to plan current operating expenses into years beyond the next year for which funds are being appropriated.

The third reason why there was no unconstitutional debt or pledge of credit is that the Constitution specifically provides for the constitutionality of laws enacted to provide for an effective method of financing the State's needs. Ga. Const. Art. VII, Sec. IV, Para. IX (1983). This provision provides that the "debt" provision, to the extent it conflicts with this provision of the Constitution, is construed to yield to same. To ensure that this section of the Constitution covers the upcoming salary of classified employees, (including anticipated increases such as within-grade pay increases, promotions, etc.) the Georgia Constitution provides that the Governor shall submit a budget message and report which shall provide for funds to

operate departments and agencies and meet current expenses for the next fiscal year. Ga. Const. Art. III, Sec. IX, Para. II(a) (1983). Subsection b of this same provision of the Constitution states that the General Assembly shall annually appropriate those state and federal funds necessary to operate all the various departments and agencies.

The freeze, which covered FYs 1992-1995, and the Budget Reports and Budget Messages for FYs 1993-1995, which did not include funding for within-grade pay increases, specifically violated these provisions of the Constitution. In addition, the General Assembly's deappropriation of funds during FY 1992 and its failure to appropriate sufficient funds in FYs 1993-1995 violated these provisions of the Constitution.

Fourth, the Georgia Constitution prohibits an appropriations act from doing anything other than setting aside a maximum amount of money for a State agency and then leaving it up to the discretion of the State agency to apply those funds for a lawful purpose. 1980 Op. Atty. Gen'l. 80-163; Ga. Const. Art. III, Sec. IX, Para. III (1983). Thus, the Appropriation Bills for FYs 1992-1995 do not specifically appropriate or specifically not appropriate money for within-grade pay increases. Instead, they simply provide for a certain amount of money for personal services for each agency or department. The only way to determine whether it was probably intended that this lump sum include within-grade pay increases, or not include same, is through the actions of the Governor in freezing the within-grade pay increases and the instructions of the OPB as to whether same were to be requested by the agencies in their proposed budgets. (R.2390-2392).

The law is clear that each agency had a duty to spend the amount of money appropriated to it for its legal obligations, including within-grade pay increases. However, the agencies were specifically told not to grant within-grade pay increases, whether they could afford them or not.[3]

If an agency did not have enough money to pay for within-grade pay increases and to pay for all other personal services required by the Act, there were several legally required solutions. First, there was a monthly Legislative committee which was supposed to reallocate funds to cover legal obligations. O.C.G.A. §28-5-25. Second, the State Merit System had a contingency for lack of funds because it had a provision for reductions in force or reductions in salary of individuals based on objective criteria. Defendants admit that the use of same would have allowed the agencies to grant within-grade pay increases. (R.1981). However, the Governor did not allow agencies to use these provisions because of his unilateral freeze and the later regulations concerning a period of budgetary restraint. Thus, there was no "debt" or pledge of

---

[3] Indeed, when the State Merit System told the various agencies in 1992 that they would allow an exception to the freeze for "special circumstances," the Department of Labor indicated that it would grant within-grade pay increases to all employees and that the funds would come out of the monies it already had. The Department of Labor and the other agencies were then instructed that the exception was being withdrawn and that there were to be no within-grade pay increases. Thus, those agencies that could afford within-grade pay increases, without taking other measures, were prohibited from fulfilling their legal obligations. (R.787; 831-832; 2062; 2185-2191).

credit for FYs 1992 through 1995. Instead, there was an illegal failure of the government to allow within-grade pay increases out of available funds.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should issue to review the judgment below.

Respectfully submitted,

Alan S. Gaynor
BOUHAN, WILLIAMS & LEVY
Post Office Box 2139
Savannah, Georgia 31498-1001
(912) 236-2491

ATTORNEYS FOR PETITIONERS

APPENDIX A — OPINION OF THE SUPREME COURT OF GEORGIA DECIDED MARCH 3, 1997

IN THE SUPREME COURT OF GEORGIA

S96A1906.

BUSKIRK et al. v. STATE OF GEORGIA et al.

THOMPSON, Justice.

For nearly 25 years, the state gave within-grade pay increases to employees in the classified service of the State Merit System who rated "satisfactory" or better in their job performance appraisal. Then, on April 25, 1991, responding to a budget crisis in fiscal year 1991, the governor called for an immediate freeze on such pay hikes. The General Assembly appropriated money for within-grade wage increases in fiscal year 1992. However, it met in August 1991 and removed that money from the budget. Thereafter, the legislature refused to fund within-grade pay increases in fiscal years 1993, 1994 and 1995.

Plaintiffs, who are employees in the classified service, brought this class action lawsuit on September 1, 1994, asserting the state government violated the State Merit System Act[1] by illegally withholding within-grade pay increases. They sought damages for breach of contract, impairment of contractual rights, and, pursuant to 42 USC § 1983, violations of constitutional rights. The trial court dismissed any claims pertaining to fiscal years 1991 and 1992, finding that they were barred by the statute of limitations. The trial court granted summary judgment to defendants upon the remaining claims, concluding that any

1. OCGA § 45-20-1 et seq.

obligation on the part of the state to pay wage increases in the future would constitute an illegal pledge of credit. Plaintiffs appeal.

1. The legislature has given the State Personnel Board authority to adopt rules and regulations effectuating the state merit system. OCGA § 45-20-4 (a) (3). When approved by the governor, the merit system rules and regulations have the force and effect of law. Id; *Brown v. State Merit System,* 245 Ga. 239, 242 (2) (264 SE2d 186) (1980).

The State Personnel Board adopted, and the governor approved, a rule which provided, in part:

> Each employee shall be considered for a salary advance at least annually. The appointing authority may advance an employee's salary by any number of steps up to and including step seven of the range; provided, however, that prior to such an advancement the appointing authority must execute a performance appraisal or otherwise document the reason for advancement.

Rules of the State Personnel Board, Chapter 478-1-.OA, Par. A.302. Plaintiffs argue that this rule, coupled with the state's longstanding practice of paying annual within-grade wage increases, gave them a contractual right to be paid such increases. See *Clark v. State Personnel Board,* 252 Ga. 548, 549 (2)(a) (314 SE2d 658) (1984) (Merit System Act creates constitutionally protected contract between merit system employees and state).

Appendix A

We assume, *arguendo,* that a rule which requires the state to **consider** salary increases, also requires the state to **give** salary increases. Nevertheless, we hold that, unless the General Assembly authorized the expenditure of salary increases for a given fiscal year, see *Busbee v. Georgia Conference American Association of University Professors,* 235 Ga. 752, 760 (2) (221SE2d 437) (1975), the state was not required to give them. Why? Because the General Assembly cannot pledge the good faith and credit of the state into the future. *State Ports Authority v. Arnall,* 201 Ga. 713, 728 (41 SE2d 246) (1947). See also Ga. Const. of 1983, Art. III, Sec. IX, Par. I ("No money shall be drawn from the treasury except by appropriation made by law."). As this Court has said: "No one legislature can tie the hands of its successors with reference to a subject upon which they have an equal power to legislate. [Cits.]" *State Ports Authority v. Arnall,* 201 Ga. 713, 728, supra. The mere fact that the state gave salary increases to its classified employees for 25 consecutive years does not mean it was bound to do so in the future. See *Warren v. Crawford,* 927 F2d 559, 564 (11th Cir. 1991) (mutual understandings cannot create a property interest in employment that is contrary to law).

2. OCGA § 9-3-22 provides that actions for the recovery of wages accruing under a law respecting the payment of wages must be brought within two years after the right of action accrues. *City of Atlanta v. Adams,* 256 Ga. 620 (351 SE2d 444) (1987). It follows that, insofar as they pertained to fiscal years 1991 and 1992, plaintiffs' claims were time barred because they were based on statutes (i.e., the appropriation acts), not contracts. Id. Compare *Balkcom v. Jones County,* 196 Ga. App. 378 (395 SE2d 889) (1990) with *Muscogee County Board of Education v. Boisvert,* 196 Ga. App. 537, 539 (2) (396 SE2d 303) (1990). Inasmuch as the statute of limitations for the recovery of back

pay under 42 USC § 1983 must follow the most analogous Georgia statute of limitations, *Cook v. Ashmore*, 579 FSupp 78 (N.D.Ga. 1984), plaintiffs' federal civil rights claims are also time barred. *Grimes v. Pitney Bowes Inc.*, 480 FSupp 1381 (N.D.Ga. 1979).

Judgment affirmed. All the Justices concur.

APPENDIX B — ORDER OF THE SUPERIOR COURT OF FULTON COUNTY, STATE OF GEORGIA DATED MAY 6, 1996

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

CIVIL ACTION

FILE NO. E-31547

RONALD B. BUSKIRK and WILLIAM J. ESTILL,

Plaintiffs

VS.

THE STATE OF GEORGIA AND THE HONORABLE ZELL MILLER, GOVERNOR, individually and in his official capacity, et al.,

Defendants

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT, AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to O.C.G.A. §§ 9-3-33 and 9-3-22, the defendants in this class action move the Court to dismiss all of plaintiffs' claims which arose prior to September 1, 1992, on the ground that the claims are barred by the statute of limitations. The defendants also move the Court for summary judgment as to all of plaintiffs' claims which arose after September 1, 1992. O.C.G.A. § 9-11-56(c).

Appendix B

Pursuant to O.C.G.A. § 9-11-56(c), the plaintiffs move the Court for summary judgment as to all claims raised in the complaint.

After reviewing the entire record, relevant legal authority, and arguments presented at the hearing held on April 1, 1996, the Court rules as follows.

The Court GRANTS defendants' motion to dismiss plaintiffs' claims which arose prior to September 1, 1992. As to the remaining claims, the Court GRANTS Defendants' motion for summary judgment and DENIES plaintiffs' motion for summary judgment.

Background

The plaintiffs filed this action seeking declaratory and injunctive relief on September 1, 1994. On September 22, 1995, upon plaintiffs' motion, the Court certified this suit as a class action. The class is comprised of Georgia State Merit System employees who are or were members of the classified service of the State Merit System during fiscal year 1992 through the present.

In April 1991 the state government instituted a "pay freeze" which resulted in many classified employees being denied annual salary increases and/or career step advances.

Plaintiffs essentially challenge the government's actions regarding the freeze of the within-grade pay increases for those employees under the classified State Merit System Act. Plaintiffs contend that defendants have failed to provide them and other similarly situated members of the class with either wage

increases and/or career step advances for fiscal year 1992 through the present. In the alternative, plaintiffs claim that defendants failed to reimburse plaintiffs and other members of the class with the appropriate back pay and step advances at the end of the period of "budgetary restraint".

Pursuant to defendants' alleged acts and/or omissions, plaintiffs contend that defendants have violated the State Merit System Act, O.C.G.A. § 45-20-1 *et seq.* ("Act"); that the defendants have breached plaintiffs' employment contracts, which are allegedly provided for under the Act; that they have violated plaintiffs' rights to procedural and substantive due process and equal protection; and that defendants have impaired plaintiffs' contractual rights. Plaintiffs seek injunctive relief, damages, and attorney's fees.

Defendants' Motion to Dismiss

The Court GRANTS defendants' motion to dismiss. As this suit was filed on September 1, 1994, the state and federal claims which arose prior to September 1992 are barred by the two-year statute of limitations. *City of Atlanta v. Adams,* 256 Ga. 620 (1987); O.C.G.A. §§ 9-3-22, 9-3-33.

O.C.G.A. § 9-3-22 provides that all actions for the recovery of wages, overtime, or damages and penalties accruing under laws concerning payment of wages and overtime shall be brought within two years after the right of action has accrued.

O.C.G.A. § 9-3-33 provides actions for injuries to the person shall be brought within two years after the right of action accrues. In a federal action brought under 42 U.S.C. § 1983, the period of limitations is specified in O.C.G.A. §§ 9-3-22 or 9-3-33. *Cook*

v. Ashmore, 579 F. Supp. 78 (N.D. Ga. 1984); *Roberts v. H.W. Ivey Constr. Co.,* 408 F. Supp. 622 (N.D. Ga. 1975); *Harris v. Anaconda Aluminum Co.,* 479 F. Supp. 11 (N.D. Ga. 1979).

Under the authority cited, the Court finds that all of plaintiffs' claims for damages or back pay prior to September 1, 1992, are barred by O.C.G.A. §§ 9-3-22 and 9-3-33. Accordingly, defendants' motion to dismiss is GRANTED.

Cross Motions for Summary Judgment

O.C.G.A. § 9-11-56(c) provides for summary judgment when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. Summary judgment is appropriate when the court, viewing all the facts and reasonable inferences in a light most favorable to the nonmoving party, concludes that the evidence does not create a triable issue as to each element of the case. *Lau's Corporation v. Haskins,* 261 Ga. 491, 495 (1991).

With regard to plaintiffs' claims arising after September 1, 1992, the Court GRANTS defendants' motion for summary judgment. Plaintiffs' motion for summary judgment is DENIED.

Assuming *arguendo* that the policies under the State Merit System Act creates an employment contract with its classified employees, the Court finds that such a purported contract is not valid. The plaintiffs are not entitled to future salary increases under the purported contracts since public funds were not appropriated by the General Assembly. Compare *Busbee v. Board of Regents of the University System of Georgia, et al.,* 235 Ga. 752, 760(2) (1975).

Appendix B

The plaintiffs are not entitled to future salary increases where the Georgia constitution prohibits the government from entering into contracts which pledges credit and expends public funds without an appropriation of the requisite funds by the General Assembly. See Ga. Const. Art III, ¶ IX, § I *et seq.*

Plaintiffs essentially argue that for classified merit system employees a satisfactory performance would assure them of an annual salary increase under the State Merit System Act and under the rules and regulations of the State Personnel Board.

However, the purported employment contracts at issue are subject, not only to the availability of public funds, but also to a legislative appropriation of such funds. The State is prohibited from expending public funds unless such payment or obligation has been authorized by the Georgia General Assembly. Compare *Busbee,* supra at (2). See Ga. Const. Art III, ¶ IX, § I *et seq.*

A government agency shall not execute a contract with a private party for the expenditure of public funds which purports to obligate appropriations or state funds which are not on hand at the time of contract. Compare *Busbee,* supra. See also *State Ports Authority v. Arnall,* 201 Ga. 713, 728 (1947) (any act by the state government that pledges the good faith and credit of the State for the payment of money in future years shall be null and void).

There is no evidence in the record to show that requisite funds were appropriated to satisfy any purported salary increases for fiscal years 1993 to 1995. Moreover, any agreement to pay future salary increases to state employees are barred by the Georgia Constitution as an illegal pledge of credit by the state government. *Arnall,* supra; Ga. Const. Art III, ¶ IX, § I (no money

shall be drawn from the treasury except by appropriation made by law).

Consequently, the Court finds that there is no basis for the underlying contract claim, and summary judgment is warranted for the remaining claims of the complaint.

Conclusion

The Court GRANTS defendants' motion to dismiss plaintiffs' claims which arose prior to September 1, 1992. As to the remaining claims, the Court GRANTS defendants' motion for summary judgment. The plaintiffs' motion for summary judgment is DENIED.

SO ORDERED, this 6th day of May, 1996.

s/ Don A. Langham

DON A. LANGHAM, Judge
Superior Court of Fulton County

Copies to:

Joseph A. Mulherin III
Wilbur D. Owens, III
Bouhan, Williams & Levy
P.O. Box 2139
Savannah, GA 31498-1001

Jeffrey L. Milsteen
Susan L. Rutherford
State Law Department
40 Capitol Square, S.W.
Atlanta, GA 30334-1300

APPENDIX C — ORDER DENYING MOTION FOR RECONSIDERATION OF THE SUPREME COURT OF GEORGIA DATED APRIL 3, 1997

Atlanta, April 03, 1997

SUPREME COURT OF GEORGIA

Case No. S96A1906

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

RONALD B. BUSKIRK et al. v. STATE OF GEORGIA et al.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

[stamped]

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.

Sharie M. Welch, Clerk.